"ARBITRATION" AS A TERM OF INTERNATIONAL LAW.*

In spite of the breaking out of The Great War, involving in its meshes more than half of the land on the earth and the majority of the great powers of the world as well as many small ones, at present ten in all, nevertheless ample proof is to be found in the historic development of International Arbitration, especially within the past fifty years, as a mechanism for settling differences between nations by judicial means, that, thanks to the establishment of the International Courts which sat upon the *Alabama* claims and the Bering Sea Fur Seal Fisheries cases respectively, a precious instrument to avoid war in many instances beyond the scope of diplomatic negotiations to settle, has been evolved in the institution known as International Arbitration. Unfortunately of late years a tendency has arisen to confound International Arbitration with Municipal Arbitration and to minimize if not indeed to deny entirely the judicial quality of arbitration as a component part of the Law of Nations. Doubtless this confusion in the thoughts of those who have not studied attentively the philosophical development of the Law of Nations is largely due to a failure to realize that the word *Arbitration* has come to have different meanings according as it is used in Municipal Law on the one hand and International Law on the other. It seems, therefore, well worth while to examine the meaning of the word arbitration, as it has been defined in the older dictionaries of the English language, both in England and America, together with the meaning of the word mediation. Then to test the sense and meaning of the word arbitration as used by some of the undoubted masters of the science of the Law of Nations. And finally compare the judgments given by the Geneva and Paris International Tribunals in the *Alabama* claims and the Bering Sea Fur Seal cases respectively, with some decisions rendered by some notable Municipal Courts. In that way a just opinion as to what was intended by the men who thought out and developed the institution of International Arbitration could be formed.

First of all let us see what meaning the earlier English lexicographers have assigned to the word *arbitration* and then what

*The composition of this article was completed upon May 13, 1915.

sense the earlier American lexicographers have given to the same word.

In the fourth edition of Edward Phillips' well known dictionary, *The New World of Words,* published at London in 1678 by himself, he merely says:

"Arbitrator (Lat.) An umpire, a commissioner, chosen by mutual consent to decide controversies between party and party."

In his fifth edition printed in 1696, he says:

"Arbitrator, (Lat.) An umpire, a commissioner, chosen by mutual consent to decide controversies between party and party."

"Arbitrament, An award, Determination, or Judgment which one or more make at the request of two or more parties upon some Debt, Trespass, or other Controversie."

In the seventh edition of 1720,[1] much more is given in reference to the general subject of arbitration, as follows:

"Arbiter, an Arbitrator, an Umpire, a Sovereign Disposer. See Arbitrator.

"Arbitrage, an Arbitrator's or Umpire's Decree or Sentence.

"To arbitrate, to award, give Sentence, adjudge, or act as an Arbitrator.

"Arbitration, the Act of Arbitrating, the Putting an End to a Difference by the Means of Arbitrators.

"Arbitrator, an extraordinary Judge, indifferently chosen by the mutual Consent of two Parties, to decide any Controversy between them; a Days-Man, or Referee: The *Civilians* make a difference between *Arbiter* and *Arbitrator;* the former being obliged to proceed according to Law and Equity; whereas the latter is left wholly to his own Discretion, to act without Solemnity of Process, or Course of Judgment."

Thus Phillipps, while at first he does not define very precisely what an arbitrator is, gradually in his succeeding editions leans more and more to the view that an *arbitrator* is a *judge* and his decisions are *judgments.* Again Phillipps, in his fifth edition, speaks of arbitrament as being a judgment. In his seventh edition of 1720, the judicial quality of *arbitration,* using the word in a generic sense, is much more marked and clearly stated. Thus "to arbitrate" is said in that edition, among other definitions, to mean to "give sentence," and "to adjudge." And the word "arbitrator" is defined as meaning "an extraordinary judge."

[1]The New World of Words, or Universal English Dictionary, compiled by Edward Phillipps, Gent. Seventh edition, London, 1720.

In the latter part of the eighteenth century, Samuel Johnson, who surely was a man of letters possessed of no small knowledge of the meaning of his native English tongue, supports in his Dictionary much more strongly and exactly than his predecessor Phillipps the judicial character of arbitration. For example, in the fourth edition of his celebrated *Dictionary* published in 1773,[2] he says:

"An Arbiter, n. f. (Lat.)

"1. A judge appointed by the parties, to whose determination they voluntarily submit.

"2. One who has the power of decision or regulation; a judge.

"To Arbitrate, v. a. (*arbitror*, Lat.)

"1. To decide; to determine.

"2. To judge of.

"To Arbitrate, v. n.

"To give judgment.

"Arbitration, n. f. (from *arbitror*, Lat.)

"The determination of a cause by a judge mutually agreed on by the parties contending.

"Arbitrator, n. f. (from arbitrate).

"1. An extraordinary judge between party and party, chosen by their mutual consent.

"Arbitrement, n. f., (from *arbitror*, Lat.)

"1. Decision; determination.

"2. Compromise."

Thus Johnson speaks of an arbiter as a "judge". To arbitrate he defines as "to decide" and "to judge of." "Arbitration" he says is the settling of a question by "a judge mutually agreed on" by the disputants. In the end he defines the word "arbitrament" equally as meaning a decision and a compromise, two distinctly opposite terms. But excepting this last definition which is one half in favor of supporting the idea that the group of words described by the generic term "arbitration" means an adjustment of a dispute upon the basis of give and take by the disputants, Johnson strongly supports the view that in his time the word "arbitration" meant the settlement of a controversy by a judge chosen by the parties concerned to decide that one specific case.

[2]Samuel Johnson, Dictionary of the English Language: fourth edition, revised by the Author, London, 1773.

Johnson's support of the judicial meaning of the word arbitration in his time is further attested by his clear definitions of the group of words that may be classified under the generic word *mediation.* In the edition of 1773, Johnson says:

"To mediate, v. n. (from *medius*, Latin.)

"1. To interpose as an equal friend to both parties; to act indifferently between contending parties; to intercede.

"2. To be between two.

"Mediation, n. f. (*mediation*, French; from *medius*, Lat.)

"1. Interposition; intervention; agency between two parties, practised by a common friend.

"2. Agency interposed; intervenient power.

"3. Intercession; entreaty for another.

"Mediator, n. f. (*mediateur*, French.)

"1. One that intervenes between two parties.

"2. An intercessor; an entreator for another; one who uses his influence in favor of another.

"3. One of the characters of our blessed Saviour."

Thus mediation, according to Johnson's Dictionary, clearly means an attempt to have a difficulty arranged by the friendly advice of a third party.

If we turn next to American lexicographers we find that Noah Webster, in the first edition of his well known *Dictionary*,[3] says:

"Arbitrate, v., to hear and judge as an arbitrator.

"Arbitration, n., reference of a controversy to persons chosen by the parties, a hearing before arbitrators, award.

"Arbitrator, n., a person chosen by a party to decide a controversy, one who has the sovereign right to judge and control."

"Mediate, v., to endeavor to reconcile, to limit.

"Mediation, n., an interposition, agency, entreaty.

"Mediator, n., an intercessor, kind adviser, manager."

A comparison of the above two groups of words, as defined by Webster makes it clear that in Webster's judgment when he published his first dictionary in 1806, an arbitrator's function was to judge, while that of a mediator was to adjust a dispute. He does not say one word to suggest that arbitration means a compromise even in a remote degree.

In the 1841 edition of Webster, a great deal more is said about both groups of words. In speaking of an arbiter or arbitrator

[3]Noah Webster, A Compendious Dictionary of the English Language, New Haven, 1806.

and of arbitration, except that twice he says that an arbiter or arbitrator has the power of judging or deciding "without control," Webster still describes an arbiter or arbitrator as a judge chosen for a certain specific case, in other words a judge chosen *ad hoc*. For to Arbitrate he says, in 1841, means "to decide; to determine; to judge of." Mediation and Mediator and their kindred words, he defines as synonymous with reconciliation or adjustment.

While Webster does not support as clearly as some of the earlier English lexicographers do the judicial character of an arbitrator and of arbitration, Worcester, the other great American lexicographer emphatically does. In his edition of 1846[4] Worcester says:

"Arbiter, n. (L.) One appointed to decide a point in dispute, an arbitrator, a judge.

"Arbiter, v. a. To judge.

"Arbitrate, v. a. (i. arbitrated; pp. arbitrating, arbitrated.) To decide; to judge of.

"Arbitrate, v. n. To give judgment. South.

"Arbitration, n. Act of Arbitrating. (Law.) The investigation and determination of a cause by an unofficial person, or by persons mutually chosen by the contending parties; arbitrament.

"Arbitration, Bond. n. (Law.) A solemn obligation to submit to an award. Blackstone.

"Arbitrator, n. An umpire; a judge. (Law.) A person chosen by parties at variance to determine a matter in dispute."

"Mediate, v. n. (*medius*, L.) (i. mediated; pp. mediating, mediated.) To interpose, as a common friend, between two parties, to intercede; to be between two.

"Mediate, a. (*médiat*, Fr.) Intervening; middle; be between two extremes.

"Mediation, n. (Fr.) The act of mediating; interposition, intervention, agency interposed; intercession.

"Mediator, n. (*mediator*, L.; *médiateur*, *Fr.*) One who mediates; an intercessor; one of the characters of our blessed Saviour."

In the above definition of those two groups of words, Worcester says of an *arbiter* that he is "a judge," and to *arbitrate* is "to decide; to judge of," while an *arbitrator* he maintains is "a judge." In that group he says nothing of reconciliation or anything else that suggests in the remotest degree compromise. But in the

[4]Joseph E. Worcester, Dictionary of the English Language, Boston, 1846.

group of words relating to mediation, he does distinctly maintain that they mean reconciliation. A comparison of the two groups of words makes it still more clear that in Worcester's estimation an arbitrator was a *judge* chosen for the occasion.

If one turns from these two renowned American lexicographers to the *Law Dictionary* of John Bouvier, one finds that in his second edition of 1843,[5] he maintains that an arbitrator is a judge.

Bouvier says:—

> "Arbitrator:—A private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same. Arbitrators are so called because they have generally an arbitrary power, there being in common no appeal from their sentences, which are called awards."

When he defines mediation, however, he says that it means compromise.

> "Mediation, is the act of some mutual friend of two contending parties, who brings them to agree, compromise or settle their disputes."

Thus in defining these two words Bouvier sharply defines the difference between them, to wit, that an arbitrator is to judge, while a mediator is to bring about an agreement by means of a compromise.

In the edition of 1894 of this same work,[6] there is this definition:—

> "Arbitrator. In Practice. A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties."

In the above definition the judicial character of an arbitrator is distinctly maintained.

In the edition of 1914,[7] edited by Francis Rawle, we find:

> "Arbiter: A person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man."

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[5] John Bouvier, A Law Dictionary, second edition, Philadelphia, 1843.

[6] John Bouvier, A Law Dictionary, Philadelphia, 1894.

[7] John Bouvier, Law Dictionary & Concise Encyclopedia, third revision, eighth edition, by Francis Rawle, Kansas City and St. Paul, 1914.

Then the following illuminating statement is immediately made:

> "This distinction between arbiters and arbitrators is not observed in modern law."

Continuing to define the word, arbiter, Bouvier's 1914 edition says:

> "One appointed by the Roman praetor to decide by the equity of the case, as distinguished from the *judex*, who followed the law."
>
> "One chosen by the parties to decide the dispute; an arbitrator."

In this last edition of Bouvier nothing is said about an arbitrator being a reconciler.

After this review of some of the leading authorities in the meaning of words in English, it is evident that the words *arbitrator* and *arbitration* when used as terms of Municipal Law in the past meant something different from the boards of arbitration which, constituted to-day under Municipal Law to decide between corporations and their employees, often agree to recognize most of the demands of the latter regardless of any justice or equity applicable to the controversy. So that in the light of the masters of the meaning of English words, it is evident that the words *arbitrator* and *arbitration* as often used to-day in practice in our municipal relations have so largely changed their meanings of a half century and more since, that in municipal affairs to-day an arbitrator has in many instances almost entirely lost the judicial character that was designated by the same word in the middle of the last century and before that time. Nevertheless, the meaning attaching often to-day in Municipal Law to the words arbitrator and arbitration does not alter the fact that according to the best English and American lexicographers, those words in the past did mean that an arbitrator was a temporary judge and not a reconciler, and that when an arbitrator was appointed to hear a cause of difference between two parties, he was to decide the case as a judge and not to try to arrange it by a compromise.

All these lexicographers, however, when they defined the words arbiter, arbitrator, arbitration and kindred words did not have in mind specifically the Law of Nations. Consequently, to find more authoritively the meaning of those words as terms of the Law of Nations, it will be necessary next to examine what some of the

leading publicists have understood by the word arbitration and kindred words when used as terms of International Law. The value of the opinions of well known publicists as to what is the Law of Nations has been attested by eminent judges sitting in the highest courts in the world. Thus Sir William Scott, afterwards Lord Stowell, sitting in 1799 in the High Court of Admiralty of England upon the case of *The Maria,*[8] relied on the Swiss publicist, Vattel, "not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe." And in 1900 in the case of *The Paquete Habana,*[9] Justice Gray of the United States Supreme Court said of the Law of Nations and treatises on that Law:

"International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decisions, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the Law ought to be, but for trustworthy evidence of what the law really is."

Among such publicists and jurists, first let us turn to Baron Pufendorf's treatise, *The Law of Nature and Nations,*[10] originally published in 1672. In discussing the means other than war of settling the differences that arise, he refers to arbitration, after other modes of settlement have failed, in these words: "The only thing they [the disputants] can do, is to pitch upon an *Arbitrator,* and each bind himself to stand to his Award."

Speaking of the qualifications necessary for an impartial arbitrator, Pufendorf says that no one must be chosen for such a position who has a reason that one side or the other shall win. Then concerning the way the arbitrator shall judge, Pufendorf says:[11]

[8](1799) 1 C. Rob. 340, *364.

[9](1900) 175 U. S. 677, 700.

[10]Samuel Pufendorf, Of the Law of Nature and Nations, Oxford, 1710.

[11]*Id.,* p. 435.

"Now altho' the contending Parties enter into Compact with the *Arbitrator*, about taking upon him his Office, (for as no Arbitrage can be exercised without the Consent of the Parties, so no one can be forced to be *Arbitrator* against his own Consent;) yet it is not from the Force of that Compact, that he becomes obliged to judge according to what he thinks is agreeable to the Laws of Conscience and Equity: or they to stand to his Award. For the Law of Nature, which can receive no Enforcement from any Compact, obliges him to judge according to Justice; and they are obliged to submit, without any Reserve, to his Determination, because otherwise the Design of going to an *Arbitrator* would be frustrated, and there would be no End to such Appeals."

After discussing the question whether an arbitrator should judge according to the law, or whether he should mitigate its severity, Pufendorf says:[12]

"If it be doubtful under which of these two Qualifications the *Arbitrator* is chosen, he ought to suppose himself tyed up to those Rules, which a Judge would be obliged to follow; for it is for want of a Judge and Judicature that he is called in: And, in a doubtful case, we ought to take that side which is clearest. Besides, an Arbitrator can't so easily act unjustly, if he has a limit, as if he has an absolute Power delegated to him." Then Pufendorf makes a reference to mediation and the duties of a mediator in these words: "Indeed to persuade a Mitigation of the Rigour of the Law is properly their Business who voluntarily, without entring into any Engagements, interpose, as common Friends, between the contending Parties."

Then as to the kind of law that judges should use in judging, he says: "Now as he that judges between Fellow-subjects, judges according to the *Municipal* Laws of that Place; so he who judges between those who acknowledge no common *Municipal* Laws, ought to judge according to the Law of Nature; unless the Parties submit their Cause to the positive Laws of some particular State."

Many times Pufendorf speaks of the "judgment" of an arbitrator. He also says: "This *Arbitrators* have in Common with *Judges*, that, in the Examination of Matters of Fact, they ought to shew themselves equal to the bare Asservation of each party, *i. e.* when they contradict one another, to believe neither. But when Deeds, Arguments and undeniable Instruments can't be pro-

[12] *Id.*, p. 436.

duced, they must then give Judgment according to the Testimony of Witnesses."

In the same chapter in which he treats of arbitrators and arbitration, Pufendorf also speaks of mediators whom he differentiates clearly from arbitrators as follows:

"But *Mediators,* who interpose between contending Nations, either preparing or actually engaged in War, and endeavour, by their Authority and their Arguments and Intreaties, to bring them to Terms of Accommodation are not properly *Arbitrators.*"

Thus in Pufendorf's conception, if contending Nations appealed to an arbitrator, that arbitrator was to judge between them, while a mediator was to reconcile them by more or less of a compromise.

The Swiss, Emer de Vattel, in the second half of the eighteenth century says:[13]

"The mediator ought to observe an exact impartiality; he should soften reproaches, calm resentments, and draw minds towards each other. His duty is to favor what is right, and to cause to be restored what belongs to each: but he ought not scrupulously to insist on rigorous justice. He is a moderator, and not a judge: his business is to procure peace; and to bring him who has right on his side, if it be necessary, to relax something with a view to so great a blessing. * * * * * When sovereigns cannot agree about their pretensions, and yet desire to maintain, or to restore peace, they sometimes trust the decision of their disputes to arbitrators chosen by common agreement. As soon as the compromise (agreement) is concluded, the parties ought to submit to the sentence of the arbitrators; they have engaged to do this, and the faith of treaties should be regarded."

The German, J. B. Klüber, writing in the early part of the nineteenth century says:[14]

"If the person who has been chosen [arbitrator] accepts, he has the right, after a discussion and a sufficient examination of the reasons *pro* and *con,* to pronounce the arbitral judgment (*laudum*) which he believes conforms with the principles of the Law of Nations."

That is what Lord Stowell, for instance, attempted to do in the famous judgments which he gave when he sat in the High Court

[13]Emer deVattel, The Law of Nations, or Principles of the Law of Nature, Dublin, 1787, pp. 415-416.

[14]J. B. Klüber, *Droit des Gens Moderne de L'Europe:* Paris, Sec. 318, p. 457.

of Admiralty of England upon prize cases. It was his aim, he said, in the case of *The Maria*,[15] where Swedish vessels were involved, not to forget that while the seat of his Court was local, the Law of Nations which he was to apply in his Court was world wide in its application and as binding on one Nation as another. Nevertheless, like all municipal judges sitting in prize cases, his judgments in the long run were influenced undoubtedly in some degree by the needs of his own country to successfully prosecute the war in which she was engaged.

In our own times, as a result of the additional impetus given to the development of international justice as a means of avoiding war by the successful submission of the *Alabama* claims for judgment to the Geneva Tribunal, a number of distinguished international publicists representing the best learning of many nations in the Law of Nations, may be mentioned, who have in one way or another expressed their understanding of what is meant by *arbitration* as a term of International Law.

Thus the Belgian, Gustave Rolin-Jaequemyns, the originator and one of the founders, in 1873, of the *Institut de Droit International,* has clearly and forcibly enunciated his opinion on this point. Writing in 1891 in the *Revue de Droit International,* of which he was one of the three founders as well as editor-in-chief for many years, he discusses the agreement between France and the Netherlands in 1888, which those two Nations modified two years later, to submit to the Emperor of Russia as arbitrator their difference over the frontier line between French and Dutch Guiana. In the convention as amended in 1890 it was provided that the arbitrator "in case he did not reach, after an examination, to designate as a frontier one of the two rivers mentioned in the convention of 1888, he was eventually authorized, for an intermediary solution, to adopt and decide upon another boundary which would pass through the contested territory." This new agreement, whereby the arbitrator was invested with authority, in case he could not decide in favor of the boundary claimed by one or the other of the two Powers, to impose upon the two Nations a compromise, was criticised severely in the States General of the Netherlands, because upon an arbitration demanding from the judge a decision based upon the evidence and the law, there

[15] (1799) 1 C. Rob. 340, 350.

was grafted a mediation. After pointing out that two States could, if they wished, graft upon the powers of an international arbitrator acting as a judge those of a mediator, that is of what is known as an *aimable compositeur,* Rolin-Jaequemyns went on to say:

"There is an International Law. This Law grows either from conventions, or from general principles accepted by civilized Nations. The essential object of resorting to arbitration between States is, not to create that Law, but to cause to be sought and decided by a temporary judge voluntarily chosen—owing to the want of a permanent and obligatory jurisdiction—in what manner International Law is applicable to a given case, which is the cause of a disagreement between the parties. The States which accept arbitration recognize by that very thing (and it is that which gives to that procedure so great a value) that their difference is susceptible of being settled by the rules of International Law, either general or conventional. It is to falsify that idea and to compromise its application, to admit beforehand in the agreement (*compromis*) itself, the eventuality of a solution dictated, not by the Law, but by an arbitrary appreciation of the conveniences of each party."

In view of the above expressed opinion, especially the last sentence, it is evident that in the opinion of the founder of the *Institut de Droit International,* by the terms *International Courts of Arbitration* and *International Arbitrators,* are meant International Courts and International judges chosen to function temporarily so as to pass judgment in the light of the Law of Nations upon some designated case of difference between two or more Nations, just as Municipal Courts and Municipal judges give judgment in the light of Municipal Law upon cases of difference between individual citizens or corporations. There is, however, this difference between these two classes of jurisdiction. International Courts of Arbitration and International Arbitrators are appointed *ad hoc* to judge particularly designated cases, while Municipal Courts and Municipal judges are appointed with a continuing power in the exercise of a compulsive jurisdiction, to judge all cases that may be brought before them. But in both of these classes of jurisdiction, in the International as well as in the Municipal, the Courts are to decide according to the Law, in the one case according to the Law of Nations, in the other according to Municipal Law.

Three years later, Louis Renault, the chief expert adviser upon the Law of Nations to the French Foreign Office, in commenting

upon the Bering Sea Fur Seal case, expressed his conception of the nature of international arbitration.[16] He says:

"The normal mission of arbitrators, whether they are appointed by Governments or by private individuals, is to decide a *difference,* to solve a question of Law or fact concerning which the parties are in disagreement. The arbitrators must find, from the documents produced, who is wrong or who is right; they pronounce a veritable judgment."

Then commenting on the conclusion made public on January 10, 1831, by the King of the Netherlands as to the Anglo-American boundary which had been referred to him to decide as arbiter, Renault says:

"It was not truly a sentence; the arbitrator had not fulfilled his mission which was to judge and he had done what was not asked of him; in truth he had assumed the role of a spontaneous mediator, proposing a friendly solution of the difference."

Next discussing a boundary question between Great Britain and Portugal, in which case the contending Nations agreed in case the arbiter, the President of the French Republic, could not decide entirely in favor of the contention of one or the other Nation, that he should have the right then "to give such decision which, in his view, would offer an equitable solution of the difficulty," Renault, after remarking that this was not a strict case of mediation, since the sentence of the arbiter was to be accepted by both parties, whatever it might be,[17] went on to say:[18]

"Thus the two States, foreseeing that their difference perhaps could not be settled by a juridical decision, and wishing nevertheless to settle it, gave to the arbiter a special power which went beyond the ordinary limits of the competence of a judge."

Then again, after discussing the Bering Sea case and the powers granted by the two litigant Nations to the International Court of Arbitration which sat in 1893 at Paris in judgment on that case, Renault says:[19]

"Two persons may have every reason to come to an agreement to form a partnership for example, or to make an exchange; if

[16] L. Renault, *Une nouvelle mission dennée aux arbitres dans les litiges internationaux a propos de l'Arbitrage de Behring: Revue Générale de Droit International Public.* Paris, 1894, pp. 44-51.

[17] Protocole of September 25, 1872; de Clercq, *Recueil des traités de la France,* V, XI, p. 39.

[18] *Revue Générale de Droit International Public,* Paris, 1894, p. 45.

[19] *Id.,* p. 50.

they do not do so, they merely make use of their natural liberty, and one cannot say that there is litigation between them. In case, however, that they should be anxious to come to an understanding and should appoint a third party to define the conditions which would seem to him equitable for an arrangement, it would be wrong to call that third party an arbitrator, since his mission is in no manner that of a judge." And then in a foot-note to the passage just cited, the learned French publicist further says: "I know perfectly that arbitration in industrial affairs is understood in this sense, but it is so used in an inexact way."

These extracts from Renault make it clear that he considered, at the time he wrote, that an international arbitrator is a judge and not a reconciler.

In a letter printed in the London *Times*, January 6, 1896, proposing a peaceful solution of the Anglo-Venezuelan crisis, John Westlake, then holder of the Whewell chair of International Law in Cambridge University, wrote:

"It is that of arbitration, with a restriction presently to be mentioned, combined with mediation. An arbitrator can only pronounce a judgment; he cannot make a recommendation as a mediator can. When England and the United States referred the boundary between Canada and Maine to the arbitration of the King of the Netherlands, that Sovereign did not adjudicate on the respective lines proposed by the parties, but proposed an intermediate one as a compromise, which the United States were not bound to accept and did not accept. Now in the present case it is more than probable that an arbitrator would find legal grounds enough for ruling out the *maximum* claims on both sides, even if he were not prevented from entertaining them by the restriction presently to be suggested. But it is also probable that for some part of the intermediate region he might be unable to find any legal grounds of decision, and that all he could do would be to propose a line of his own. Then, if the parties had from the beginning accepted him in the character of mediator as well as in that of arbitrator, they would not indeed be bound to accept a line which he did not declare to be one of legal obligation, but his proposal, made as it would be after hearing all that could be said on that branch of the subject, would carry such weight that no party desirous of peace would refuse to accept it."

Westlake, in his treatise *International Law*, in contrasting arbitration with mediation, says of the former of these two

functions:[20] "The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of a mediator."

Earlier in the same work, in commenting on the general division between the differences that arise between Nations which seem capable of being decided by International Courts upon legal grounds and those which because of the great political interests involved for the Nations concerned, apparently cannot be so settled, Westlake also says:[21] "That distinction is not *eo nomine* one of old standing in the theoretical treatment of international law. It has been brought into prominence under the nomenclature of legal or juridical and political by the discussions and negotiations on *arbitration, which is essentially a juridical proceeding.*"[22]

From the three above quoted passages it is very evident that Westlake considered that International Courts of Arbitration have not the right to arrange the cases which they are called on to decide by a compromise arrangement, that attribute being the proper function of mediation. On the contrary, judging from the above quoted extracts, Westlake evidently considered that international arbitrators and International Courts of Arbitration in passing upon differences between Nations were to decide upon legal grounds.

The delegates of Russia, among them Fedor de Martens, to the First Hague Peace Conference in 1899 addressed to the representatives of the other twenty-five Powers who took part in that gathering of the Nations, memoranda in which the merits of and the distinction between mediation and arbitration were discussed.[23] In the first *memorandum,* the Russians pointed out that the difference between good offices and mediation was more theoretical than real, and also that "mediation does not impugn in any way the principle of the sovereignty, liberty and independence" of states. In a second *memorandum,* the Russian delegates noticed

[20]Westlake, International Law (2nd ed.), Pt. 1, p. 354.

[21]*Id.,* p. 305.

[22]The italics have been added by the present writer.

[23]Blue Book: C. 9534 miscellaneous, No. 1 (1899). Correspondence respecting the Peace Conference held at The Hague in 1899. Presented to both Houses of Parliament by Command of Her Majesty, Oct., 1899, pp. 39-45.

the difference between voluntary and obligatory arbitration, and pointed out that "it is difficult to conceive of a difference of a legal nature, arising within the scope of positive International Law which could not as a result of an agreement between the parties, be solved by means of optional International Arbitration." Concerning compulsory arbitration, the Russian report pointed out very. wisely that it cannot be applied to every kind of disputes. "There is no government," it says, "which would consent to accept beforehand the obligation to submit to the decision of the Tribunal of Arbitration every difference which might arise in the domain of international relations if it affected the national honor of the State, its highest interests and its imprescriptible wealth. Actually, the reciprocal rights and obligations of States are determined, in a notable measure, by the general consensus of what are called political treaties, which are nothing else than the temporary expression of fortuitous and transitory relations between the different national forces. These treaties bind the freedom of action of the parties so long as the political conditions which produced them remain without change. When these conditions change, the rights and obligations resulting from these treaties necessarily change also. As a general proposition, the conflicts which arise over political treaties turn in most cases, not so much on a difference in the interpretation of such and such a rule, as on the change to be made in the provisions of the treaty or its complete abrogation. Consequently the powers which take an active part in the political life of Europe, cannot submit the differences which arise out of the political treaties to a Court of Arbitration, *in the eyes of which what is laid down by treaty would be as binding and inviolable as what is laid down by the positive law is in the eyes of a national Court of Justice.*"[24]

Thus in the report presented by the Russian delegates to the representatives of the other nations who were parties to the First Hague Conference, it is distinctly affirmed that an International Court of Arbitration, like "a national Court of Justice," is, in giving its judgment, bound by the Law, in the one case by the Law of Nations, in the other by the Municipal Law of the country where the National Court has its seat.

Last but not least, the learned American jurist, John Bassett Moore, speaking of mediation and arbitration, says:[25] "These

[24]The italics have been added by the present writer.

[25]Moore, Int. Law Digest, § 1069.

methods are often discussed as if they were practically the same, but in reality they are fundamentally different. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. While nations might for this reason accept mediation in various cases in which they might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted.

"It is, for example, hardly conceivable that the question of the Alabama claims could have been settled by mediation. The same thing may be said of many and indeed of most of the great number of boundary disputes that have been settled by arbitration. The importance of mediation as a form of amicable negotiation should not be minimized. * * * * Nevertheless, mediation is merely a diplomatic function and offers nothing new.

"Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of *international judicial tribunals*;[26] just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of *municipal courts*.[27] In discussing the subject of arbitration, we are therefore to exclude from consideration, except as a means to that end, mediation, good offices, or other forms of negotiation."

It is quite evident from the foregoing reviews of some of the leading dictionaries as well as the writings of some of the leading publicists, that the word *arbitration* in Municipal affairs has very much changed its meaning and departed from the use of the word as a term of International Law. And in this connection it will be useful to notice how the meaning of another word has changed as the years have rolled by.

Thus the word *State* as used in the North American Confederation between 1781 and 1789, and since the adoption of the Constitution, has changed its meaning. As applied to the original thirteen States of the Confederation before 1789, the word State meant a member of the family of Nations, a sovereign State, for

[26]The italics have been added by the present writer.

[27]*Ut supra*, n. 26.

originally the thirteen States constituted a Confederation composed of thirteen member States. To-day, however, the word State as applied to the forty-eight members of the Federal Union does not mean the same thing that it did in the times of the Confederation. For neither Pennsylvania, nor New York nor any other of the forty-eight States composing the United States of America to-day is a member of the family of Nations, as France is a State and a member of the family of Nations. These forty-eight States together form not forty-eight Nations, but only one single Nation. But the change in the meaning of the word State in the historic development and evolution by which the original Confederation of thirteen States became the one Nation of to-day known as the United States of America, does not alter the historic fact, that originally as applied to the thirteen States the word State meant thirteen separate and distinct members of the family of Nations, while to-day the same word means the various units of the North American Union, that is the component parts of but one single member of the family of Nations.

(TO BE CONCLUDED.)

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